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No. 94-2024

In the Supreme Court of the United States

OCTOBER TERM, 1995

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION AND GERALD KRESS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the civil penalties and statutory multiplier imposed on petitioners in this case were sufficiently disproportionate to the damages sustained by the government as a result of petitioners' fraud that the penalties and multiplier are barred under the Double Jeopardy Clause because of petitioners' prior criminal prosecution for the same fraud.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. A1) is unpublished, but the decision is noted at 47 F.3d 1162 (Table). The opinion of the district court (Pet. App. A2-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1995. A petition for rehearing was denied on March 10, 1995. Pet. App. A28. The petition for a writ of certiorari was filed on June 8, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Gerald Kress was the sole shareholder and president of petitioner Educational Development Network Corporation (EDN), a Pennsylvania corporation that provided educational and training materials and programs to the Army National Guard in connection with its high school recruitment program. Pet. App. A2-A3. From 1983 to 1986, petitioners were paid by the government under four cost-plus contracts. The first contract was for $1,341,900; the second for $1,435,700; the third for $1,521,124; and the fourth for $1,611,631. *Id.* at A3.

Petitioners engaged in a scheme to defraud the government by submitting false and inflated estimates of the costs of EDN's materials. In July, 1988, a federal grand jury indicted both petitioners on 13 counts of mail fraud, 21 counts of submitting false claims to the government, and 20 counts of submitting false statements to the government. In addition, petitioner Kress was charged with five counts of paying illegal gratuities to an Army National Guard official. Pet. App. A3.

On November 29, 1988, petitioners entered guilty pleas to all charges of submitting false claims to the government and paying illegal gratuities to a government official. The district court sentenced Kress to imprisonment for one year (later reduced to four months), and Kress agreed to pay $300,000 in restitution. The court also fined EDN $100,000 and imposed a special assessment of $4,800. Pet. App. A3-A4.

2. On October 31, 1989, the United States filed a civil action against petitioners under the False

Claims Act, 31 U.S.C. 3729 *et seq.* The complaint charged them with filing 214 false claims.

The district court granted summary judgment to the government. The court held that, because of their guilty pleas, petitioners were collaterally estopped from denying liability in the civil suit. Pet. App. A4. Under the applicable provision of the False Claims Act, the government is entitled to an award of treble damages plus a penalty of between $5,000 and $10,000 per false claim. 31 U.S.C. 3729(a). The government estimated its damages from petitioners' 214 false claims at $504,376.98. See Pet. App. A7, A25. Accordingly, the district court determined that the government should recover $2,344,530.94, representing three times the amount of the government's damages ($1,513,130.94) plus the amount of the bribe paid to the government official ($61,400), and $5,000 for each of the 214 false claims ($1,070,000), less the $300,000 restitution payment Kress made as a result of the sentencing in the criminal case. Pet. App. A25.

The district court rejected petitioners' argument that, under *United States* v. *Halper*, 490 U.S. 435 (1989), the False Claims Act penalty constituted a second punishment and was therefore barred by the Double Jeopardy Clause. Pet. App. A6-A10. The court noted that *Halper* stood for the proposition that "under certain circumstances a civil penalty may constitute punishment." *Id.* at A8. The court also noted that there were no "precise rules for determining when and whether a civil sanction constituted punishment prohibited by the Double Jeopardy Clause," *id.* at A9, but that this Court had repeatedly emphasized that the government "is entitled to rough remedial justice" and that "somewhat imprecise formulas, such as reasonable liquidated

damages or a fixed sum plus double damages," may ordinarily be used, *id.* at A8 (quoting *Halper*, 490 U.S. at 446). The court concluded, "[a]fter reviewing the record developed by the parties," Pet. App. A10, that the judgment in this case was not "overwhelmingly disproportionate to the damages caused by [petitioners]," *ibid.* (internal quotation marks omitted), and that it "bears a rational relationship to the goal of compensating the government for its loss," *ibid.*[1]

3. The court of appeals affirmed without opinion. Pet. App. A1.

ARGUMENT

This case presents a straightforward application of this Court's decision in *Halper*, and it is consistent with other appellate cases that have addressed similar issues. Further review is therefore not warranted.

1. In *Halper*, the Court made clear that the fact that "Congress provided for civil recovery in excess of the Government's actual damages" does not render that recovery a second punishment under the Double Jeopardy Clause. 490 U.S. at 442. See also *id.* at 449 ("in the ordinary case fixed-penalty-plus-double-

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[1] In granting summary judgment, the district court also rejected petitioners' arguments that the judgment sought by the government constituted an excessive fine under *Austin* v. *United States*, 113 S. Ct. 2801 (1993) (Pet. App. A10-A11); that the government was estopped from proceeding civilly against them because of the earlier criminal proceeding (Pet. App. A11-A18); and that the increased damages provisions of the 1986 amendments to the False Claims Act should not be applied retroactively to these proceedings (Pet. App. A18-A21). The question presented in this case concerns only the district court's application of *Halper*. See Question Presented (Pet. i).

damages provisions can be said to do no more than make the Government whole"). See also *id.* at 452-453 (Kennedy, J., concurring) ("the imposition in the ordinary case of at least a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount, plus double damages," is permissible). Indeed, the Court emphasized in *Halper* that the typical case under the False Claims Act would not pose any double jeopardy problems:

> What we announce now is a rule for the rare case, the case such as the one before us, where a fixed penalty provision subjects a prolific but small gauge offender to a sanction *overwhelmingly disproportionate* to the damages he has caused.

490 U.S. at 449 (emphasis added). The Court also explained that the double jeopardy analysis concerned the proportionality between the damages and costs to the government and the size of the penalty. See *id.* at 445 (civil penalty "exponentially greater than the amount of the fraud"), 449 (civil penalty bears "no rational relation" to the goal of compensating the government). Finally, the Court explained that the "rule is one of reason," *ibid.*, and that the "trial court's judgment in these matters" is entitled to substantial weight, even if it "often may amount to no more than an approximation," *id.* at 450.

This case is "ordinary" in the sense used by the Court in *Halper*, and the district court's judgment represents a straightforward application of the principles of *Halper*. Unlike the defendant in *Halper*, petitioners are not small-gauge offenders trapped by an inflexible damages formula that yields a result that is "overwhelmingly disproportionate to" or "exponentially greater than" the government's

damages. The civil penalty at issue in *Halper* was more than 220 times greater than the government's actual damages (and eight times greater than its total loss, including ancillary costs of prosecution). See 490 U.S. at 439, 452. In contrast, the amount awarded the government in this case was a little more than 4.5 times the actual damages suffered by the government. See Pet. App. A7-A10. The government's ancillary costs of investigation and prosecution would bring the ratio even closer to the fixed sum plus double damages expressly approved in *Halper*. 490 U.S. at 446. Accordingly, the court of appeals correctly affirmed the district court's judgment that, on the facts of this case, the amount of the penalty did not cross the line between a permissible remedy and an impermissible punishment.

The Court recently denied certiorari in a case substantially similar to this one. In *United States* v. *Barnette*, 10 F.3d 1553 (11th Cir.), cert. denied, 115 S. Ct. 74 (1994), Barnette and his co-conspirators were convicted of defrauding the government in connection with a contract to provide laundry services for the United States Army in Germany, and Barnette was sentenced to jail and ordered to pay $7 million in restitution. The government subsequently filed suit under the False Claims Act, in which it claimed actual damages of at least $15 million, and sought recovery of statutorily provided multiplied damages, plus relevant civil penalties. In reversing a grant of summary judgment for Barnette on double jeopardy grounds, the Eleventh Circuit held that, "[i]f the Government is correct that Barnette's fraud caused the Government $15.75 million in direct loss, then the ratio between the amount that the Government is seeking and its direct loss is only 3.2 to 1—

strikingly less than the 222 to 1 figure that so shocked the *Halper* Court." 10 F.3d at 1559.

2. Petitioners' claim (Pet. 11-12) that the decision below conflicts with the decision of the Tenth Circuit in *United States* v. *Hudson*, 14 F.3d 536 (1994), is mistaken. In *Hudson*, civil sanctions of $16,500 and $15,000 were imposed on two defendants. The court of appeals noted that "[t]he [district] court made no findings as to the actual losses incurred nor who may have suffered the losses" as a result of the defendants' unsound banking practices. *Id.* at 543. The court of appeals accordingly remanded to the district court so that such a finding could be made and the court could determine whether the sanctions were remedial or punitive. In this case, by contrast, the district court found that the government's damages amounted to $504,376, see Pet. App. A21, and based its decision on the relationship between that figure and the amount of the civil penalty that was imposed. As noted above, especially when allowance is made for some additional costs for detecting and prosecuting petitioners' fraud, the figure bears a "rational relationship" to the amount of the penalty. Accordingly, further proceedings in the district court to reduce the government's incidental costs to a fixed sum were unnecessary.

Petitioners also claim (Pet. 12-13) that the decision below conflicts with the Eleventh Circuit's decision in *United States* v. *Mayers*, 897 F.2d 1126, cert. denied, 498 U.S. 865 (1990). In that case, the defendant claimed that his criminal prosecution was barred by a prior civil sanction imposed on him under the False Claims Act. In a two-page, *per curiam* opinion, the court of appeals remanded the case to the district court for a determination whether the amount of a

civil penalty had a "rational relation to the government's loss." *Id.* at 1127. Even relying on petitioners' statement (Pet. 12) that the amount of the false claims submitted by the defendant in that case was $145,550—a figure that appears only in a judicial opinion in a different case, see *ibid.*—the civil penalty of $1,791,100 was more than 12 times that amount. The disproportion was therefore far greater than in this case. In any event, the Eleventh Circuit clearly explained its position on the issue in the later case of *United States* v. *Barnette*, *supra*. In that case, the court explained that "proportionality"—not the raw dollar amount of the sanction—"is the key." 10 F.3d at 1560. As explained above, see p. 6, *supra*, *Barnette* establishes that the Eleventh Circuit would have had no disagreement with the Third Circuit's decision in this case.

Finally, petitioners cite the decision of the Second Circuit in *United States* v. *Morgan*, 51 F.3d 1105 (1995). In that case, the court of appeals applied an analysis closely akin to that applied by the Third Circuit in this case. The Second Circuit ultimately concluded that only if the civil sanction imposed on the defendant is "overwhelmingly disproportionate to the government's damages and expenses" or is "divorced from the reality of what the government suffered in damages and expenses" can it be said to constitute punishment. *Id.* at 1115. That ruling is entirely consistent with the Third Circuit's decision in this case.[2]

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[2] Petitioners also cite (Pet. 14) *United States* v. *Williams*, No. 93-5435, 1995 WL 321250 (May 30, 1995), an unpublished decision of the Fourth Circuit. The court in that case simply held that a civil penalty was not so disproportionate to the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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